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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 673

MARGARET NUGENT, *Petitioner,*

vs.

YELLOW CAB COMPANY, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The Scheffer Press, Inc.—ANdover 3-6850

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QUESTIONS PRESENTED.

1. Can the policy of Federal procedure as expressed in Rules 59 and 6(b) which sets a definite time within which a motion for a new trial may be served and filed, be emasculated to relieve a litigant of his failure to observe these mandatory time limitations?

2. Where it is admitted that the post trial motion was not made in compliance with the time limitations of the Federal Rules of Civil Procedure, can this jurisdictional defect be cured by a motion under Rule 60(b) which merely alleges that counsel was not aware of Rules?

3. Should certiorari be granted to review the decision of the Court of Appeals that "ignorance of the rules resulting in an unauthorized extension of time can-

not serve to furnish grounds for relief under Rule 60(b), under the facts in this appeal"?

4. Should this Court grant certiorari to review a policy issue inherent in the Federal Rules of Civil Procedure or leave such a determination to the rule-making process?

THE FACTS.

Petitioner's Statement of Facts is substantially correct. However, it is not that the Petitioner fails to state that after the first request for an extension was granted, the Petitioner made and the trial court allowed numerous requests for further extensions for an enlargement of time in which to file her motion for a new trial and that the motion for a new trial was not "served" until more than five months after the entry of the judgment.

While it is true that one of the attorneys for the Respondent appeared before the trial court when the Petitioner's first motion for an extension was presented on April 28, 1960, and stated to the Court that he had no objection to the particular enlargement requested, the respondent did not consent to the further extensions requested by the Petitioner.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

As indicated in petitioners' brief, (Rules 60(b), 59(b) and 6(b) of the Federal Rules of Civil Procedure are involved. In addition, however, respondent submits that Rules 50(b), 50(d), (e) and 73(a) are also involved and are reproduced in the Appendix herein.

REASONS FOR DENYING THE WRIT.

I.

THE DECISION OF THE COURT BELOW IS IN ACCORDANCE WITH THE ESTABLISHED RULE THAT RELIEF CANNOT BE GRANTED UNDER RULE 60(b), MERELY BECAUSE THE PETITIONER WAS IGNORANT OF THE RULES.

This case cannot be distinguished in point of law from the recent decision in the case of *Hulson* v. *A.T. & S.F. Ry. Co.*, 289 F. 2d 726 (7th Cir. 1961), Certiorari denied, 82 S. Ct. 61. The principal factual difference between the *Hulson* case and the case at bar lies in the fact that in the *Hulson* case only one request for an order enlarging the time for filing a motion for a new trial was made, while in the case at bar repeated motions were made to this effect and the motion for a new trial was not "served" until more than five months after the entry of the judgment.

In the *Hulson* case the judgment of "not guilty" was entered on June 7th, 1960. On June 17th an order was entered on motion of the plaintiffs enlarging the time for the filing of a motion for judgment notwithstanding the verdict or in the alternative for a new trial for a period of ten days. Thereafter, within the 10 day extension the plaintiffs filed their motion for judgment notwithstanding the verdict and for a new trial and served copies of the same upon the attorney for the defendant.

On July 15, 1960 the defendant filed a motion to strike plaintiffs' post trial motions for the reasons that the same were not filed within the time limits prescribed

by Rule 59(b), (d) and (e), and that the court was prohibited from enlarging the time in which to serve such a motion by reason of the provisions of Rule 6(b). As, in the case at bar the plaintiffs sought relief under Rule 60(b).

Subsequently, the trial court in a written memorandum sustained defendant's motion to strike plaintiffs' post trial motions on the grounds that plaintiffs' motions were not made within the ten days after the reception of the verdict, and under Rule 59(b), the trial court was prohibited from considering such motions and also that the trial court was without jurisdiction to enlarge the time within which to file such motions under the provisions of Rule 6(b) and that Rule 60(b) was inapplicable. The Court cited the case of *Johnson* v. *New York, N.H. and H. Ry. Co.*, 354 U.S. 58, (1952); *Mickey* v. *Tremco Mfg. Co.*, (7th Cir.) 226 F. 2d 956; *Dugo* v. *Penn. Ry. Co.*, 125 F. Supp. 934; *Stewart* v. *Atlantic Refining Co.*, 235 F. 2d 570; *Fine* v. *Paramount Pictures*, 181 F. 2d 300.

The Court of Appeals accordingly held that Rule 6(b) prohibited any enlargement of the time limitations prescribed in Rules 50(b), 59(b) and 73(a). A basic principle of Federal Civil Procedure was thereby correctly decided in compliance with decisions of this Court. (*Johnson* v. *New York, N.H. & H. R. Co.*, 344 U.S. 48 (1952); *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), and *United States* v. *Robinson*, 361 U.S. 220, 229 (1960). In the *Johnson* case a verdict was returned for the plaintiff and judgment entered. Within ten days after reception of the verdict, defendant moved to have it set aside, but did not move for judgment notwithstanding the verdict. The trial court denied plaintiff's motion to set aside the verdict, and also denied the pre-verdict motion for dismissal and

for a directed verdict. On appeal, the Court of Appeals held that the motion for a directed verdict should have been granted and reversed the judgment of the District Court. 194 F. (2d) 194. The Supreme Court of the United States held that under Rule 50(b) of the Federal Rules of Civil Procedure, the Court of Appeals could not direct entry of a judgment for defendants notwithstanding the verdict, stating at page 50:

> "On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212. We repeated that construction of the rule in *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, and reemphasized it in *Fountain* v. *Filson*, 336 U.S. 681."

In *F. T. C.* v. *Minneapolis Honeywell Regulator Co.*, 344 U.S. 206, at page 211 this Court commented on the policy consideration dictating a strict enforcement of the time limitations on review and at page 213 of the opinion said:

> "Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean to encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review."

The Circuit Courts of Appeal have followed the decisions of this Court in holding that the time limitation for post-trial motions and the appeal period are jurisdictional in nature and cannot be extended. *Fine* v. *Paramount Pictures,* 181 F. (2d) 300 (7th Cir. 1950); *Waddell* v. *Chicago Land Clearance Comm.,* 206 F. (2d) 748 (7th Cir. 1953); *Raughley* v. *Penn. R. R. Co.,* 230 F. (2d) 387 (3rd Cir., 1956); *Brest* v. *Philadelphia Transp. Co.,* 273 F. (2d) 22 (3rd Cir. 1959); *Knowles* v. *U. S.,* 260 F. (2d) 852 (5th Cir., 1958); *Steward* v. *Atlantic Refining Co.,* 235 F. (2d) 570 (3rd Cir. 1956); *Virginia Land Company* v. *Miami Ship Corp.,* 201 F. (2d) 506 (5th Cir. 1953); *Randolph* v. *Randolph,* 198 F. (2d) 956 (D. C. Cir., 1952); *Deena Produce Co.* v. *United Brick and Clay Workers,* 195 F. (2d) 612 (6th Cir., 1952), cert. denied 344 U.S. 822; *Jusino* v. *Morales and Tio,* 139 F. (2d) 946 (1st Cir. 1944).

Petitioner is not entitled to relief under Rule 60(b) as this rule cannot be used to excuse a failure to file a motion for a new trial within the time required by Rules 59(b), 6(b) merely because Plaintiff overlooked these provisions.

Plaintiff's motion for relief under Section 60(b) of the Federal Rules of Civil Procedure is predicated upon the allegation that plaintiff's counsel, through a mistake and inadvertence, overlooked and was not aware of that portion of Rule (6) of the Federal Rules of Civil Procedure which provided that a court may not extend the time for the taking of any action under Rule 59(b), except to the extent that under the conditions stated in that Rule." (A. 13).

In the case of *Hulson* v. *A. T. & S. F. Ry. Co.,* 289 F. 2d 726, as in the case at bar, the only ground of relief

suggested by counsel for the appellants to invoke Rule 60(b) was that "through inadvertence and mistake" they overlooked the provisions of Rule 6(b). On this issue the *Hulson* case cannot be distinguished from the case at bar, either in fact or in point of law. In fact the attorneys for the plaintiff in the instant case appeared as *amicus curiae*, and filed a petition for a rehearing in the *Hulson* case. They sought and obtained leave to appear in the *Hulson* case upon the allegation made at that time that the decision in the *Hulson* case was decisive of the issues raised in the instant case.

As has been noted, Rule 6 (b) provides that a court may not extend the time for taking any action under Rules 50(b), 59(b), (d) and (e), "except to the extent and under the conditions stated in them." These rules contain no conditions here applicable and for this reason the time provisions have been held to be jurisdictional.

Rule 60(b) makes express reference to Rule 59(b) in subparagraph (2) and provides for relief from a final judgment where there has been "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." No reference is made anywhere else in Rule 60(b) to Rule 59(b). The fact that express reference is made to Rule 59(b) indicates that Rule 60(b) was not intended to apply to extend the time limitations of Rule 50(b) or 59(b) except under the very narrow circumstances outlined in 60(b) (2) dealing with newly found evidence. If all of the sub-sections of 60(b) had been intended to supplement the post-trial motion procedure of Rules 50(b) and 59(b), there would have been no purpose in specifying a single ground of newly found evidence, for relief from a judgment after the ten-day period has elapsed.

The only ground relied on by counsel for petitioners to invoke Rule 60(b) in their motion before the Trial Court was that through inadvertence and mistake they overlooked the provisions of Rule 6(b).

It is apparent that if petitioners prevail on this theory, this provision of 6(b) would be emasculated. If petitioners' contention is sustained every litigant who failed to comply with the provisions of these rules could then circumvent them by the mere assertion that he was unaware of or overlooked the rule. The policy which favors finality to judgments and some definite point of time denoting an end to litigation would be defeated. Furthermore, rules like 73(a) and (g) dealing with time to file notice of appeal and time in which to perfect an appeal would also be affected. These rules have also been held to be jurisdictional. If "unawareness" is permitted as a ground for evading them, they would be rendered totally ineffective.

In *John E. Smith & Sons Co.* v. *Lattimer Foundry*, 239 F. (2d) 815 (3rd Cir. 1955), the opinion of the trial court contains a comprehensive analysis of Rule 60(b), 19 F.R.D. 379 (M.D. Pa. 1956). A motion for a new trial which had been filed but not served within ten days was stricken pursuant to Rule 59(b). The court stated at 19 F.R.D. 381:

> "The provision of Rule 59(b) requiring that a motion for a new trial be served not later than ten days after entry of judgment is mandatory. Cf. *Greenwood* v. *Greenwood*, 3 Cir., 1955, 224 F. 2d 318, 319. Rule 6(b) prohibits any enlargement of the time. Cf. *Leishman* v. *Associated Wholesale Electric Co.*, 1942, 318 U.S. 203, at page 206, 63 S.Ct. 543, 87 L. Ed. 714; *Safeway Stores, Inc.* v. *Coe*, 1943, 78 U. S. App. D.C. 19, 136 F.2d 771, at page 775, 148 A.L.R.

782. 'We think that the purpose of Rule 6(b) which forbids the court to enlarge the time for taking any action under Rule 59 was to divest the court of jurisdiction to entertain a motion * * * filed out of time.' *Raughley* v. *Pennsylvania R. Co.*, 3 Cir., 1956, 230 F. 2d 387, at page 390. * * * 6(b) renders a court powerless to entertain such motions when untimely made' and where the court acts contrary to such mandate its action 'must * * * be considered as a nullity.' *Id.* Merely filing is 'not enough. cf. *Steward* v. *Atlantic Refining Co.*, 3 Cir., 225 F.2d 570."

There the defendant, however, moved for relief under Rule 60 (b) and the court in treating this motion stated at pages 383 and 384:

"Since there are no allegations in the motion or petition seeking relief under Rule 60(b), see and cf. note 5, *supra*, we can only assume that defendant's counsel rely upon mistake, inadvertence, or excusable neglect. * * * Vol. 10, Cyc. of Federal Procedure, Ch. 37, sec. 37.01, p. 292, states, "No one has ever fathomed the exact significance of the phrasing. 'Mistake' is rarely an excuse in the law and is generally frowned upon; 'surprise' is scarcely ground for a continuance, unless well justified; 'inadvertence' means unpreparedness, which is certainly no excuse in earlier stages of a lawsuit; and 'excusable neglect' is a self nullifying term, because that which is adequately excusable is not neglect."'

"Mr. Justice Frankfurter in *Klapprott* v. *United States*, *supra*, 335 U.S. at 630, 69 S.Ct. at pages 397, 398, suggests that 'neglect' in the context carries the idea of negligence and not merely non-action.

"Ordinarily to obtain relief one must be free from negligence. *Simonds* v. *Norwich Union Indemnity Co.*, 8 Cir., 1934, 73 F. 2d 412, at page 415; *Continental National Bank* v. *Holland Banking Co.*, 8

Cir. 1933, 66 F. 2d 823 at page 829; *Knox County* v. *Harshman*, 1890, 133 U.S. 152 at page 154, 10 S. Ct. 257, 3 L.Ed. 586, 'Relief is denied from error resulting from gross carelessness.' 7 Moore op. cit. *supra*, p. 233, citing *Greenspahn* v. *Joseph E. Seagram & Sons, Inc.*, 2 Cir. 1951, 186 F. 2d 616, at p. 619, 'gross carelessness'; 5 Williston on Contracts, Rev. Ed. sec. 1427, p. 3997; *Fischer* v. *Dover Steamship Co., Inc.*, 2 Cir. 1955, 218 F. 2d 682, 683.

"Mr. Justice Minton in *Ackerman* v. *United States*, *supra*, 340 U.S. at page 198, 71 S.Ct. at page 211, speaking for the court states that there 'must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from.' See *Kahle* v. *Amtorg Trading Corp.*, D. C. N. J., 13 F.R. D. 107; *In re Riedner*, D.C. E. D. Wis, 94 F. Supp. 289; *Ledwitch* v. *Storkan*, D.C.D. Neb., 2 F. R. D. 539; *Baron* v. *Leo Feist, Inc.*, 2 Cir., 1949, 173 F. 2d 288, 290. See and cf. cases, *supra*, note 8 and see 7 Moore, op. cit. *supra*, sec. 60,10(7), pp. 17 to 21, discussing possible relief under the California decisions, '* * * defaults would not be set aside where dates for filing pleadings were confused by counsel' pp. 19-20. '* * * If relief were afforded in the present case, it would render the prohibition of Rule 6(b) meaningless. A party is not relieved from the duty to take legal steps to protect his interests.' 3 Barron and Holtzoff, Federal Practice and Procedure, Pocket Part, sec. 1329. 'Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity.' 7 Moore, op. cit. *supra*, p. 224.

"In view of the foregoing, we were in error in not granting plaintiff's motion to strike the motion for a new trial."

In *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 130 F. (2d) 185, 187 (3rd Cir. 1942), the court in discussing the power of counsel to extend by stipulation the time provisions of the federal rules, stated:

"However, in addition to implications and technical rules of construction, there exists a sound policy for denying litigants the privilege of enlarging time for pleading by mere stipulation. The guiding mandate of the Federal Rules is that 'They shall be construed to secure the just, speedy and inexpensive determination of every action.' As previously noted, the express provisions in the Rules allowing stipulations aim at this goal. But, if the practice followed by the parties in this case were permitted, the purpose of the Rules would be departed from. Litigants could, as they have done in the past, materially prolong the time for the trial of a case to suit their convenience and interests. The courtesies extended by counsel in such instances, although commendable as professional comity cannot be permitted to interfere with what we think the Rules require."

This case was cited, with approval by Moore in his treatise on Federal Practice (2nd Ed. 1954), who stated at Par. 59.09(1), page 3847, footnote 28:

"Rule 6(b) clearly prohibits court enlargement of the time period in the interest of judgment finality and in preventing an undue extension of the time for appeal. Pars. 6.01(5), 16) 6.07, *supra*. It is not justifiable to allow the parties, without any court supervision, to thwart that policy, when they cannot, even with court leave, do so. And, except as provided in Rule 59(c), see P. 59.10, *infra*, the parties may not extend the time to perform acts under the Rules by a mere stipulation. *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, (C.C. A. 3rd, 1942), 130 F. (2d) 185, 6 F.R. Serv. 6b.12, Case 1 (see Par. 6.08, *supra*)."

In *Slater* v. *Peyser*, 200 F. (2d) 360 (D.C. Cir. 1952), the court stated at page 361:

"Counsel's stipulation of December 18 was not intended to extend the 10-day time limit fixed by

Rule 59(b) for filing a motion for rehearing or for a new trial. Moreover, it could not do so. 'An agreement with opposing counsel • • • is not an acceptable reason for failure to comply with the rules of court or, specifically, for failure to move in proper time for extensions of time as provided in such rules.' *Citizens' Protective League, Inc.* v. *Clark*, 85 U.S. App. D. C. 283, 284, 178 F. (2d) 703, 704."

Other decisions to the same effect are:

John E. Smith's Sons Co. v. *Lattimer Foundry and Mach. Co.*, 19 F. R. D. 379 (D.C. Pa. 1956). Aff'd 239 F. (2d) 815 (3rd Cir. 1956).
United States v. *Mayer*, 235 U.S. 55 (1914).

An analogy may also be drawn to the time period within which an appeal may be taken. It is uniformly held that such period is jurisdictional and may not be extended or waived by the parties. *Martin* v. *Hess*, 146 F. (2d) 360 (6th Cir. 1949).

II.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE STERNSTEIN CASE OR ANY OTHER CASE OF ANY COURT OF APPEALS.

The Petitioner boldly asserts that the decision of Second Circuit Court of Appeals in *Sternstein* v. *"Italia" Societa, etc.*, 275 F.2d 502, is in conflict with the decision of the Seventh Circuit in the *Hulson* case and in the instant case. Their position is untenable under the facts in the *Sternstein* case. This was a case tried by a court without a jury. Rule 52(b) requires that a motion to amend findings must be made ten days after the entry of the judgment *or the making of additional findings.*

The motion was made within the ten days after the "Findings were filed of record." This satisfied the rule. These facts are a far cry from the facts in the case at bar where the question involves jurisdiction of the Court to enlarge the time for the filing of a motion for a new trial.

In the case at bar by a series of motions the time was extended for a period of more than five months while in the *"Sternstein"* case it was at best a matter of a few days after the order of dismissal was entered, but within ten days after the Findings of Fact was filed. It is further noted that it would be impossible to file a comprehensive motion to amend the judgment under Rule 52(b) where the Findings of Facts were not of record.

Rule 6(b) by its terms is made applicable only to final judgments, orders, and proceedings. In this case plaintiff seeks relief from its failure to file a motion for a new trial within the time allowed by Rule 59(b). She is not seeking relief from a final judgment or order. The word "proceeding" must not be construed to enlarge the facts specifically described. *Cleveland* v. *U. S.*, 329 U.S. 14.

There is no claim here that the original judgment entered on the verdict was entered through mistake, inadvertence, surprise or excusable negligence. The only order involved here is the order attempting to enlarge the time in which the plaintiff might file her motion. If the court did not have jurisdiction to enter the order in the first instance, it is clear that Rule 60 does not provide such authority, and any reasonable construction of Rule 60 must be premised on the entry of a judgment order or proceedings in which the trial court had jurisdiction.

It is apparent that if appellants prevail on this theory, the provisions of 6(b) would be emasculated. Obviously, every litigant who failed to comply with the provisions of these rules could then circumvent them by the naked assertion that he was unaware of or overlooked them. The policy which favors finality to judgments and some definite point of time denoting an end to litigation would be defeated. Furthermore, rules like 73(a) and (g) dealing with time to file notice of appeal and time in which to perfect an appeal would also be affected. These rules have also been held to be jurisdictional. If "unawareness" is permitted as a ground for evading them, they would be rendered totally ineffective.

The case of *Whayne* v. *Glenn*, 114 F. Supp. 784, relied upon by the Petitioner (Plaintiff) is not in point. In a careful reading of the facts in that case disclose than an extension of time in which the Petitioner (Plaintiff) could move for a reargument was stipulated to by the parties. The Court considered this a waiver. It is further noted that in the instant case all of the extensions except the first one were without consent of the Respondent and the first enlargement was not by stipulation.

Similarly the case of *Daulton* v. *Southern Pacific Company*, 228 F. 2d 103 (9th Cir. 1955), cited by the Petitioner (Plaintiff) is not applicable upon its facts to the case at bar. In that case the Court dismissed the motion for a new trial on its merits and the question of relief under Rule 60(b) was not an issue.

III.

THE POLICY QUESTIONS OF LIMITATIONS SHOULD BE RESOLVED THROUGH THE RULE MAKING PROCESSES RATHER THAN BY JUDICIAL DECISIONS.

The Petitioner argues that the *"Inequity Perpetrated"* should be remedied by judicial construction rather than by amendments to the Rules. The *"Inequity Perpetrated"* in the case at bar is predicated upon the assumption that she received less for her disputed injuries than she had anticipated. She requests this Court to construe her failure to file a motion for a new trial for more than five months after the entry of the judgment as *"excusable"* because she failed to ascertain the time limit expressed in the rule for the filing of her motion for a new trial.

The case of *United States* v. *Robinson*, 361 U.S. 220 (1960), demonstrates the fallacy of Petitioner's Argument on this issue.

The *Robinson* case dealt with the appeal period prescribed by Rules 37(a) (2) and 45(b) of Federal Criminal Procedure. Rule 37(a) (2) provides a ten-day period for filing a notice of appeal following a judgment in a criminal case. Rule 45 (b) is similar to Civil Procedure Rule 6(b) in that it prohibits the enlargement of the time limitations on post trial motions and the appeal period. This Court held that by virtue of Rule 45(b) the ten-day appeal period of Rule 37(a) (2) could not be enlarged. In the *Robinson* case, as in the instant case, "excusable neglect" was urged as a ground for relaxing the provisions of these Rules. This Court rejected this ground as a basis for circumventing the Rules and drew a direct analogy to Civil Procedure Rule 6(b) at pages 228 and 229:

"But there is more. The prototype for Rule 45(b) was Rule 6 of the Federal Rules of Civil Procedure. When the original Criminal Rules were being prepared, the limiting clause of Rules 6(b) of the Federal Rules of Civil Procedure stated: '* * * but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.' It has consistently been held that Civil Rule 6(b) was mandatory and jurisdictional and could not be extended regardless of excuse. It must be presumed that the Advisory Committee and the Justices of this Court were aware of the limiting language of Civil Rule 6(b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure. No support for the conclusion of the Court of Appeals can be found in this history of Rule 45(b)."

This Court then concluded by noting that the jurisdictional nature of these Rules should not be altered by judicial decision. It stated at pages 229 and 230:

"That powerful policy arguments may be made both for and against flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. *United States* v. *Isthmian S. S. Co.*, 359 U.S. 314. If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possibility would unneces-

sarily produce intolerable uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it."

CONCLUSION.

It is respectfully submitted that certiorari in the case should be denied because the decision of the Court below followed decisions of this Court in enforcing basic provisions of the Federal Rules of Civil Procedure. The essence of petitioner's compalint is that he did not follow the Rules because he did not read them. Compelling policy considerations of federal procedure demanding a fixed point of time denoting an end to fitigation necessarily prevailed in this situation. Certiorari should not be granted to review the policy issue drafted into these Rules but should be left to the rule-making process.

Respectfully submitted,

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APPENDIX.

FEDERAL RULES OF CIVIL PROCEDURE CITED.

Rule 50.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might

have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 73.

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed: The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.